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Article 1: General Provisions

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UNIFORM COMMERCIAL CODE ANNOTATIONS

This section contains a digest of all reported decisions interpreting provisions of the Uniform Commercial Code published from the second week in September, 1964, through the last week in November, 1964, in the National Reporter System.

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ARTICLE 1: GENERAL PROVISIONS

SECTION 1-103. Supplementary General Principles of Law Applicable

SKEELS v. UNIVERSAL C.I.T. CREDIT CORP.
222 F. Supp. 696 (1963), reversed in part, 335 F.2d 846 (1964)
Annotated under Section 1-203, infra.

SECTION 1-201. General Definitions

PAZOL v. CITIZENS NAT'L BANK
138 S.E.2d 442 (Ga. Ct. App. 1964) [Section 1-201(20)]
Annotated under Section 3-301, infra.

HUDSPETH MOTORS, INC. v. WILKINSON
382 S.W.2d 191 (Ark. 1964) [1-201(26)]
Annotated under Section 9-504, infra.

SECTION 1-203. Obligation of Good Faith

SKEELS v. UNIVERSAL C.I.T. CREDIT CORP.
222 F. Supp. 696 (1963), reversed in part, 335 F.2d 846 (1964)

In the spring of 1959, the plaintiff, a franchised Chrysler automobile dealer, agreed to let the defendant credit company finance the purchase of his automobiles. In addition, the defendant made a capital loan of $25,000 to the plaintiff. The plaintiff, in the months that followed, was never in default on this loan but was often in default on the cars he sold. The defendant, however, disregarded these defaults, choosing not to enforce its rights under their security arrangement. By the fall of 1960, the plaintiff had fallen in arrears for the price of several cars. He thereupon applied for a second loan of $25,000, which request was forwarded through channels to the defendant's New York office where it was in fact denied. From the 10th of November onward, however, the defendant's local representative almost daily assured him that the loan had been approved and that a check was forthcoming. While the plaintiff was waiting, the defendant notified Chrysler Corporation that it was cancelling its agreements to pay for the plaintiff's automobiles. On November 28th the defendant, on some pretext, acquired

the keys to the plantiff's place of business, and early next morning, without prior notice of any kind, removed from the plaintiff's establishment all the new and used cars. Again without notice, the cars were sold. The plaintiff brought a civil action in the Federal District Court for the Western District of Pennsylvania, alleging that the defendant had pre-emptively seized his cars and thereby destroyed his business. He acknowledged that he was indebted to the defendant for the cars he had sold but argued that he was not *in default*, that the defendant had waived its right to immediate payment by acquiescing in earlier delays, and that the defendant therefore had no right to repossess when and in the manner it did. The defendant counterclaimed: (a) for the money still owed on the original loan ($12,400); (b) for the price of nine cars which the plaintiff had sold but not paid for ($25,637.53); (c) for the loss resulting from the sale of the repossessed cars ($9,378.16); and (d) for the expenses of selling these cars ($1,259.21). The jury returned a verdict for the plaintiff on his claim, awarding him $105,000 in compensatory and punitive damages, and on the counterclaim found for the defendant in the full amount of $48,674.90. On the plaintiff's motion, the court reduced the defendant's recovery to $38,037.53, holding that under Section 9-504(3) of the Uniform Commercial Code, the defendant was required to notify the plaintiff of its intended disposition of the repossessed cars, and failure to give such notice precluded it from recovering items (c) and (d) above, *i.e.*, its deficiency.

On appeal, the Court of Appeals for the Third Circuit held that in view of the local representative's misrepresentations the jury was justified in finding that the repossession without notice constituted tortious destruction of the plaintiff's business. It went on to say that such action could easily be found to violate Section 1-203 which imposes an obligation of good faith on any person seeking to enforce a contract within the purview of the Code. The court also noted that the principles of "equity" and "estoppel" supplement the Code, under Section 1-103.

On the issue of punitive damages, the court reversed, holding that under the facts of the case, where the superior officers of the defendant were unaware of the misrepresentations of the local representative, punitive damages were not called for under Pennsylvania law.

COMMENT

1. The plaintiff's waiver argument is, of course, sound. The only difficulty he apparently had was in relating it to appropriate provisions of the Code. He suggested, at the district court level, that his earlier delays in payment and the defendant's acquiescence in them had established a "course of dealing" under Section 1-205(1) or a "course of performance" under Section 2-208(1), and that as a result of this "course of dealing" or "course of performance," the contract provision calling for immediate payment had been waived or modified. The only problem is that neither of these terms—"course of dealing" or "course of performance"—are appropriate. Neither describe with technical accuracy the conduct upon which the plaintiff relied to demonstrate a waiver. Official Comment 2 to Section 1-205 explicitly

states that "course of dealing" refers solely to a sequence of conduct under contracts prior to the one in issue. It does not refer to conduct under the present contract. Moreover, Section 1-205(4) clearly provides that when a "course of dealing" hopelessly conflicts with an express term in the contract, the latter controls. Thus, in asserting that the parties' conduct under the present agreement had established a "course of dealing" and that this "course of dealing" could be relevant to show a waiver of his obligation to pay forthwith for the cars he had sold, the plaintiff simply drew from an erroneous assumption an erroneous conclusion.

Nor did the delayed payments constitute a "course of performance" under Section 2-208(1). While a "course of performance" *does* refer to a pattern of action under the contract in issue and *is* relevant to demonstrate the waiver of an inconsistent contractual provision, a "course of performance," as contemplated by the Code, relates solely to contracts for the sale of goods. Sections 2-102 and 2-208(1) make this clear. However, the contract in question is not for the sale of goods; it is a security arrangement.

This does not mean that the Code ignores or fails to recognize the common law doctrine of waiver in commercial contracts other than those for the sale of goods but simply that the plaintiff was hanging his hat on the wrong sections of the Code. Instead of relying on Sections 1-205(1) and 2-208(1), he should have relied, as the circuit court cryptically suggested, on Section 1-103 which sweepingly states that, unless otherwise provided, the principles of law and equity, including estoppel, shall supplement the Code.

2. The district court refused to award the defendant its deficiency because of its failure to give the plaintiff notice of resale. On the propriety of this action, see the casenote to the lower court's decision in 5 B.C. Ind. & Com. L. Rev. 580 (1964), from which most of this annotation is drawn.

S.L.P.

ARTICLE 2: SALES

SECTION 2-316. Exclusion or Modification of Warranties

BERK v. GORDON JOHNSON CO.

232 F. Supp. 682 (E.D. Mich., S.D. 1964)

The plaintiff is a butcher and merchandiser of Kosher poultry. Wishing to expand the size of his business, he negotiated with the defendant for the purchase and sale of automated equipment. Before he ordered the equipment, however, he was shown by the defendant a drawing which depicted how the equipment would fit into his premises. In the lower right hand corner of the drawing appeared the handwritten words, "Kosher operation." Later, the plaintiff signed a purchase order prepared by the defendant. On the reverse side of the order there was a clause in small print which disclaimed all warranties, express or implied, except for a promise to repair or replace defective parts within ninety days. When the equipment proved unsuitable for the plaintiff's ritual purposes, he sued, *inter alia*, for breach of warranty, alleging that the drawing constituted part of the contract and that the legend